NO. 21879

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES DONALD EDWARDS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

Appellant, James Donald Edwards, was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on November 10, 1966, in Case No. 36811-CD [C. T. 2.][1/] The Indictment charged a violation of Title 50 Appendix, United States Code, Section 462, Universal Military Training and Service Act; Refusal to be Inducted.

On December 19, 1966, appellant was arraigned before the Honorable A. Andrew Hauk, United States District Court Judge and

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1/ "C. T." refers to Clerk's Transcript of Record.

entered a plea of not guilty. Appellant was represented by retained counsel at all stages of the proceedings. On February 6, 1967, the case was called for Court trial before the Honorable Jesse W. Curtis, United States District Court Judge. It was continued for decision to February 13, 1967, on which date the defendant was found guilty. On March 20, 1967, appellant was sentenced to the custody of the Attorney General for a term of 3 years [C. T. 28]. A timely notice of appeal was filed on March 28, 1967 [C. T. 31].

Jurisdiction of the trial court was found upon Title 50 Appendix, United States Code, Section 462 and Title 18, United States Code, Section 3231. This Court has jurisdiction pursuant to Title 28, United States Code, Section 1291 and 1294.

II

STATUTES AND REGULATIONS INVOLVED

Title 50 Appendix, Section 462, United States Code, provides in part:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect to refuse

to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both . . . ."

32 C. F. R., 1626(a) provides in pertinent part:

"The registrant, . . . may appeal to an Appeal Board from any classification of a registrant by the Local Board except . . . registrant's physical or mental condition."

32 C. F. R., 1626(c) provides in pertinent part:

"The registrant . . . may take an appeal authorized under paragraph (a) of this section at any time within the following period:

(1) Within 10 days after the date the Local Board mails to the registrant a Notice of Classification (SSS Form 110)."

32 C. F. R., Section 1641. 2(b) provides:

"If a registrant or any other person concerned failed to claim and exercise any right or privilege within the required time, he shall be deemed to have

waived the right or privilege."

32 C. F. R., 1624. 1(a) provides:

"Every registrant, after his classification is determined by the Local Board (except a classification which is itself determined upon an appearance before the Local Board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the Local Board designated for the purpose if he files a written request therefor within 10 days after the Local Board has mailed a Notice of Classification (SSS Form 110) to him. Such 10-day period may not be extended."

III

STATEMENT OF FACTS

At the time of the trial of this case, a photographic copy of the official Selective Service System file of this appellant was offered and admitted into evidence as Government's Exhibit No. 1 [R. T. 8].[2/] This file and the testimony of appellant during the trial revealed the following facts with respect to appellant's registration status in the Selective Service System.

2/ "R. T." refers to Reporter's Transcript of Record.

The defendant registered with Local Board No. 115 on January 16, 1963 (pages 1 and 2).[3/] On April 8, 1964, Local Board No. 115, hereinafter referred to as "the Board", received a completed Classification Questionnaire (SSS Form 100), in which the defendant claimed to be a Jehovah's Witness and signed the series requesting conscientious objector forms (pages 4-10 at page 7). On April 28, 1964, the Board received a completed Special Form for Conscientious Objector (SSS Form 150) (pages 12-16). On June 8, 1964, the Board placed the defendant in Class I-A by a vote of 2-0 (page 11). On June 9, 1964, notice of this classification was mailed to the defendant (page 11). No appeal from the Board's classification was taken by the defendant.

On May 20, 1965, defendant was ordered for an armed forces physical examination on June 11, 1965 (page 17). On June 11, 1965, the defendant reported for his physical examination and was found acceptable (page 18). On June 15, 1965, defendant notified the Board his name had been legally changed from James Donald Humphreys to James Donald Edwards (page 19). On June 15, 1965, the Board received a request for a new Form 110 from the defendant in view of this name change (page 20). At that time, defendant admitted receiving his original notice of classification mailed June 9, 1964 (page 20). On June 15, 1965, the Board also received a completed Current Information Questionnaire (SSS Form 127) from the defendant (pages 26 and 27).

3/ Refers to pages of appellant's Selective Service File, Government's Exhibit No. 1.

On October 25, 1965, defendant was again classified I-A by the Board (page 11). On October 29, 1965, a notice of this classification was mailed to the defendant (page 11). No appeal was taken by the defendant from the October 25, 1965 classification.

On December 23, 1965, the defendant was ordered to report for induction on January 11, 1966 (pages 29 and 48). On January 11, 1966, defendant reported to the induction center, and submitted for a pre-induction examination (pages 30-41) and completed various other forms preliminary to induction (pages 42-60). Thereafter on January 11, 1966, the defendant refused to be inducted into the armed forces (pages 61-63 and 65).

IV

QUESTIONS PRESENTED

1. Appellant's failure to prosecute an administrative appeal should preclude him from collaterally attacking his classification in this Court.

2. Appellant was properly processed by his Local Board.

3. Appellant was not improperly processed at the induction ceremony.

V.

ARGUMENT

1. APPELLANT'S FAILURE TO PROSECUTE AN ADMINISTRATIVE APPEAL SHOULD PRECLUDE HIM FROM COLLATERALLY ATTACKING HIS CLASSIFICATION IN THIS COURT.

Appellant's prime contention is that the Local Board had before it sufficient facts to warrant a conscientious objector classification. It is suggested that because of its refusal to do so, it is the duty of this honorable Court to "search the record" for affirmative evidence supporting the Local Board's denial of the requested classification. For this proposition the appellant cites the decision or the holding in Dickinson v. United States, 346 U.S. 389 (1953). (Appellant's Brief, page 4).

It is indeed established that, according to the decision in Dickinson, it is the duty of an Appellate Court to examine the record to determine if the Local Board had any evidence whatsoever which could justify its classification.

But it is also well established that the prerequisite for such judicial scrutiny is that the registrant had exhausted the remedies of administrative appeal. Evans v. United States, 252 F. 2d 509 (9th Cir. 1958).

The appellant in this case at no time appealed either of his 1-A classifications. Government Exhibit No. 1, Selective Service File, reflects that on June 9, 1964 notice of the 1-A classification was sent to appellant (Selective Service File, p. 11). In addition,

2. APPELLANT WAS PROPERLY PROCESSED BY HIS LOCAL BOARD.

The appellant's argument relative to the unauthorized processing by the Local Board is as follows: "It appears from the oral testimony in court, and unrebutted, that the board members, although assigned to independent panels, operate independently, that is, they operate on work of other boards with respect to prohibited activity. The testimony of the Group [cluster of local boards, officed together] Coordinator shows that what members did in various registrants' cases could not be distinguished. Reporter's Transcript page 11, line 18 on to page 20, line 11." (Appellant's Brief, pp. 9 and 10).

A reading of the testimony of Margaret Okerstruom, Coordinator of Local Board Group E, of Downey, California, does not substantiate this contention. Mrs. Okerstruom, called as a witness by the defendant, testified that she has been Coordinator for Local Board Group E since 1950 (R. T. 10), and that at the time of trial she was unable to determine which board members participated in the classification of the appellant for the reason that she did not have with her the requisite documents (R. T. 19 and 20).

An examination of her testimony, the only witness who testified relative to the composition of the boards, indicates no irregularity whatsoever as to the classification of the appellant. The mere fact that the witness did not have with her information as to

which board members voted on defendant's classification should in no way lead to the conclusion that, had they been produced, it would have been shown that an irregularity had existed.

Appellant has cited the case of Olvera v. United States, 223 F. 2d 880, 822 (5th Cir. 1955), as standing for the proposition that the type of procedure as employed by appellant's board " . . . has been judicially condemned by various courts" (Appellant's Brief, p. 10).

The holding in the Olvera case has no application to the issue raised by appellant. The case concerned the issue of the arbitrary refusal of the local board to reopen and reconsider a registrant's classification. The court held that the board's refusal was unreasonable and arbitrary and hence ousted the board of its jurisdiction to proceed further unless it acted on the registrant's request. It was in the context of that fact situation that the court held the Local Board to a strict compliance with regulations.

3. APPELLANT WAS NOT IMPROPERLY PROCESSED AT THE INDUCTION CEREMONY.

Appellant, in his brief, has argued that "it is well established that a clear line between civilian and military status must be maintained," and contends that "the oral testimony (R T. p. 22, line 21) shows the form letter account of the ceremony, pages 61 and 62 of the Government's exhibit was incorrect in several particulars, some crucial. This testimony was unrebutted." (Appel-

ant's Brief, pp. 10 and 11).

Appellant has failed to mention any examples of such discrepancies, has not pointed out which instances could be deemed as "crucial", or more importantly, has not disclosed what possible prejudice the appellant may have suffered.

An examination of the trial record would, it is submitted, clearly reflect an absence of substantial deviation from the normal practice and the absence of any prejudice to the rights of the accused.

The decision in Chernekoff v. United States, 219 F. 2d 721 (9th Cir. 1955), was cited by the appellant. In that case, the registrant at the time of induction was not given the opportunity to "step forward" because the Army authorities deemed it a useless formality. The court held, as one of its grounds for reversal, that the appellant ought to have been given the opportunity ". . . a last clear chance to change his mind and accept induction rather than certain indictment . . . ." United States v. Chernekoff, 219 F. 2d 721, 725 (9th Cir. 1955)

But no such issue appears in the instant case. The appellant himself admitted at the trial that he was given two opportunities to step forward and on each occasion refused (R. T. 23 and 24).

Appellant was, in the words of the Chernekoff decision given "a last clear chance" to accept induction. Knowing the consequences, he refused induction. It is submitted that a reading of the record reflects no possible prejudice to the rights of the appellant.

VI

CONCLUSION

For the reasons stated above, it is respectfully submitted that the decision of the District Court should be affirmed.

Respectively submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Eric A. Nobles

ERIC A. NOBLES